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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1433

TELEVISION RECEPTION CORPORATION, Petitioner,

versus

COMMONWEALTH CABLE COMPANY, - Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

A. WALLACE GRAFTON, JR.
JON L. FLEISCHAKER
SHERYL G. SNYDER
WYATT, GRAFTON & SLOSS
2800 Citizens Plaza
Louisville, Kentucky 40202
Counsel for Petitioner

WESTERFIELD-BONTE CO., INC., 619 W. KENTUCKY, LOUISVILLE, KY.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. _____

TELEVISION RECEPTION CORPORATION, - *Petitioner,*

v.

COMMONWEALTH CABLE COMPANY, - *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, Television Reception Corporation, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on January 22, 1975.

OPINIONS BELOW

The opinions of the Court of Appeals of January 22, 1975, and July 15, 1971, which are not reported, appear in Appendices A and C hereto, respectively. The opinion of the Court of Appeals of June 24, 1970, is reported at 426 F. 2d 174, and appears in Appendix B hereto. The opinion of the District Court for the Eastern District of Kentucky, which is not reported, appears in Appendix D hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on January 22, 1975. A timely petition for rehearing, with suggestion that rehearing be *en banc,* was denied on March 25, 1975, and this petition for certiorari was filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the Court of Appeals denied Petitioner due process of law when it refused to consider a valid defense to Respondent's Counterclaim and thereby allowed unconstitutional state action to stand unchallenged?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved in this Petition are the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States. The pertinent text of those Amendments is set forth in Appendix E hereto.

STATEMENT OF THE CASE

In 1958, the City of Somerset, Kentucky, awarded a cable television franchise to Petitioner, Television Reception Corporation. Then, on two separate occasions in 1959, the City Council of Somerset attempted to revoke that franchise for Petitioner's alleged failure

to have its CATV system operative within six months after the granting of the franchise.

However, the City did not give Petitioner prior notice that revocation of its franchise would be considered at either meeting. Nor was Petitioner given an opportunity to present evidence on the factual questions related to the City's attempted revocations.

In 1966, the City awarded a new CATV franchise to Dunbar-Murphy & Co., which assigned it to the Respondent, Commonwealth Cable Co. Soon afterward, the present action was commenced in the District Court for the Eastern District of Kentucky when Petitioner sued Dunbar-Murphy for reasons not now relevant. The District Court's jurisdiction rested on the diversity of citizenship between Petitioner and Dunbar-Murphy.

When the Respondent, Commonwealth Cable, was made a defendant in this action, it filed a counterclaim against Petitioner alleging that Petitioner was tortiously usurping Respondent's franchise rights by continuing to operate its CATV franchise.

Petitioner's defense to that counterclaim rests ultimately upon the unconstitutionality of the City of Somerset's attempt to revoke Petitioner's franchise without notice or a prior hearing. Kentucky law is well-settled that a colorable claim of title to a competing franchise is a complete defense to the tort of franchise usurpation. Petitioner's defense was that it still retained a valid franchise, or at least colorable claim to a valid franchise, because the City's attempt to revoke Petitioner's franchise failed to comply with the requirements of due process of law.

After a trial to the bench, the District Court entered judgment for the defendants on both Petitioner's complaint and Respondent's counterclaim. On the first appeal, the Sixth Circuit vacated and remanded for reasons not now relevant.

One of Petitioner's contentions on the first appeal was that the federal courts did not have jurisdiction of this case because the City of Somerset was an indispensable party to the adjudication of Commonwealth's counterclaim, and that joinder of the City as an indispensable party would defeat diversity. The Court of Appeals, however, held that the City was not even a necessary party.

Thereafter, Petitioner brought a direct action in state court against the City of Somerset, alleging that the City's attempt to revoke Petitioner's franchise contravened due process and seeking declaratory relief that its franchise remained valid. However, Respondent moved the federal court to enjoin the state court proceedings and the federal court issued the injunction, holding that the issues raised in state court would be adjudicated in the present litigation. The Sixth Circuit affirmed the injunction.

After the hearing on remand, the District Court again entered judgment for Respondent on its counterclaim and ordered Petitioner to dismantle its CATV system and to pay damages to Respondent in an amount equal to all the profits Petitioner had earned from its CATV system after respondent was awarded a competing franchise.

On appeal, the Sixth Circuit expressly refused to consider the merits of Petitioner's defense that it had colorable claim to a franchise because of the City's denial of due process to Petitioner when it attempted to revoke Petitioner's franchise without notice or a hearing.

The Sixth Circuit now held that Petitioner's defense was an attack on the franchise revocation which could be raised only in a direct action against the City, and the Court now held that this direct action "would require the joinder of the City of Somerset as a party," which would defeat diversity jurisdiction. However, the Court did not dismiss for want of jurisdiction. Nor did it dissolve the injunction against Petitioner's direct action in state court, although it now held that was the only forum in which Petitioner could raise its constitutional argument against the City. Instead, the Court affirmed the judgment for Respondent without even considering the merits of Petitioner's constitutional defense.

When these inconsistent holdings were brought to the Court of Appeals' attention on petition for rehearing, the Court denied the petition without opinion.

REASONS FOR GRANTING THE WRIT

The Court of Appeals Denied Petitioner Due Process of Law By Refusing to Consider a Valid Defense to Respondent's Counterclaim, Thereby Allowing Unconstitutional State Action to Stand Unchallenged.

The principle defense raised below by the Petitioner to the claim of usurpation of a franchise is that the failure of the City of Somerset to afford Petitioner a "due process hearing" before it revoked Petitioner's franchise vitiated the attempted revocation, leaving Petitioner with a valid franchise, or at least a colorable claim to a valid franchise, either of which is, under Kentucky law, a complete defense to the claim of usurpation of a franchise.

However, through three conflicting decisions, the Court of Appeals has affirmed the judgment holding that Petitioner usurped Respondent's franchise without ever passing on the merits of Petitioner's defense. Indeed, the cumulative effect of the Court of Appeals' three decisions in this case is that Petitioner has been denied the right to raise a valid defense to Respondent's counterclaim in federal court and, at the same time, has been enjoined by the federal courts from litigating the constitutional question which is the basis of that defense in state court.

Specifically, the Court of Appeals has held that Petitioner's constitutional claims can only be raised in a proceeding to which the City of Somerset is a party and, therefore, that the City is an indispensable

party to this litigation. However, the Court has also held that joinder of the City would defeat the diversity jurisdiction on which this action is premised. Yet, instead of dismissing the action for want of jurisdiction, the Court has told Petitioner to raise its constitutional claims by suing the City in state court; but the Court has also affirmed the District Court's injunction against Petitioner's direct state court action against the City. Finally, the Court of Appeals has now summarily affirmed the judgment for Respondent without considering the merits of Petitioner's constitutional defense.

The cumulative effect of the Court of Appeals' three decisions is that the constitutional infirmities of the City's action in taking Petitioner's property cannot be adjudicated in state or federal court, and the judgment of usurpation has been affirmed while a sound defense to that judgment has not even been considered, even though the defense is of constitutional dimensions.

This result clearly conflicts with the most basic elements of the Fifth Amendment's due process requirements and has so far departed from the proper course of judicial proceedings as to call for the exercise of this Court's power of supervision.

Furthermore, the Court of Appeals' affirmance of both the judgment in this action and the injunction against the state court action leaves standing the City's revocation of Petitioner's franchise without the "due process hearing" required by a number of this Court's

very recent cases.[1] The Court of Appeals' decision, therefore, also conflicts in principle with those cases.

The Court of Appeals' decision that joinder of the City would defeat diversity jurisdiction in this case also conflicts in principle with decisions of this Court. Diversity jurisdiction is tested according to the facts as they existed when the action was initiated and is not defeated by the subsequent joinder of nondiverse parties. *See, e.g., Wichita R.R. & Light Co.* v. *Public Util. Comm.*, 260 U. S. 48, 53-54 (1922); *Hardenbergh* v. *Ray*, 151 U. S. 112, 118-19 (1894); *Phelps* v. *Oaks*, 117 U. S. 236 (1886). The Sixth Circuit recognized this maxim in its first opinion in this case when it held that joinder of the Respondent did not defeat diversity jurisdiction despite the fact there is no diversity jurisdiction between Petitioner and Respondent. *See*, p. B-5, 426 F. 2d at 177-78. Accordingly, the joinder of the City as an indispensable party to Petitioner's defense to Respondent's counterclaim would not defeat diversity.

Furthermore, if the City is an indispensable party whose joinder would defeat diversity, the Court of Appeals should have dismissed for want of federal jurisdiction rather than affirming the judgment which was rendered without joinder of an indispensable party. *See, e.g., Travelers Indemnity Co.* v. *Westinghouse Elec. Co.*, 429 F. 2d 77, 79-80 (5th Cir. 1970); *Provident Tradesmens Bk. & Trust Co.* v. *Lumbermens Mut. Cas. Co.*, 365 F. 2d 802 (3rd Cir. 1966); *Lewis* v.

[1] *See, e.g., Perry* v. *Sindermann*, 408 U. S. 593 (1972); *Fuentes* v. *Shevin*, 407 U. S. 67 (1972); *Bell* v. *Burson*, 402 U. S. 535 (1971); *Goldberg* v. *Kelly*, 397 U. S. 254 (1970).

Lewis, 358 F. 2d 495, 501-02 (9th Cir. 1966); *Stevens* v. *Loomis,* 334 F. 2d 775 (1st Cir. 1964); *Mashak* v. *Hacker,* 297 F. 2d 495, 496-97 (7th Cir. 1961); *Matthies* v. *Seymour Mfg. Co.,* 270 F. 2d 365, 368 (2nd Cir. 1959); *Young* v. *Garrett,* 149 F. 2d 223, 228 (8th Cir. 1945). The Court of Appeals' decision is therefore also in conflict with these decisions of other Circuits.

In sum, once it held that the City was an indispensable party to the adjudication of Petitioner's defense, the Court of Appeals should have either dismissed for lack of diversity jurisdiction or remanded for a retrial after the joinder of the indispensable party. Instead, the Court simply affirmed the judgment without even considering Petitioner's defense and told Petitioner to litigate its defense in a separate proceeding against the City, despite the fact that Petitioner had been enjoined from bringing such a proceeding. In so holding, the Court of Appeals has denied Petitioner due process of law and has allowed the unconstitutional actions of the City to stand unchallenged.

The procedural snarl created by the Court of Appeals' three inconsistent opinions could be resolved in any of three ways. The Court could dissolve the injunction against the state court proceeding and stay proceedings in this case pending the outcome of that litigation. *See, e.g., City of Meridian* v. *Southern Bell T. & T. Co.,* 358 U. S. 639 (1959). Or the Court could reverse and remand for further proceedings, holding that joinder of the City as a defendant would not defeat diversity any more than did the joinder of Respondent. *Wichita R.R. & Light Co.* v. *Public Util.*

Comm., supra. Or the Court could dismiss for want of federal jurisdiction. *Provident Tradesmens Bk. & Trust Co.* v. *Lumbermens Mut. Cas. Co., supra.*

In any event, the Court of Appeals' affirmance without even considering Petitioner's constitutional defense cannot be allowed to stand.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the U. S. Court of Appeals for the Sixth Circuit.

Respectfully submitted,

A. Wallace Grafton, Jr.
Jon L. Fleischaker
Sheryl G. Snyder
Wyatt, Grafton & Sloss
2800 Citizens Plaza
Louisville, Kentucky 40202

Counsel for Petitioner

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 74-1430

TELEVISION RECEPTION CORPORATION,
Plaintiff-Appellant,
v.
CHARLES A. DUNBAR,
DUNBAR-MURPHY COMPANY, INC.,
COMMONWEALTH CABLE CO.,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Eastern District of Kentucky, London Division.

Decided and Filed January 22, 1975.

Before: WEICK, EDWARDS, McCREE, Circuit Judges.

PER CURIAM. This is an appeal from a judgment dismissing appellant's complaint, determining that appellant had usurped the cable television franchise rights of Commonwealth Cable Company, ordering appellant to discontinue all operations of a community television antenna system within the corporate limits of Somerset, Kentucky, requiring appellant to remove all its equipment used in this business from the streets and public places of the City of Somerset, and requiring appellant to account to appellees for all profits accruing from its operation of the business from June 28, 1966. This judgment, which was made a final and appealable order, was entered following the taking of additional evidence pursuant to our remand of this cause for further proceedings consistent with our opinion, reported at 426 F. 2d 174 (1970).

Appellant had contended below that appellee Charles Dunbar agreed to assist it in obtaining a twenty year franchise from the City of Somerset, Kentucky for the continued operation of its cable television system so that Dunbar could purchase the system for an undisclosed principal for Three Hundred Thousand Dollars less a brokerage fee of Fifteen Thousand Dollars. Appellant claimed that a fiduciary relationship was created by reason of this agreement and that Dunbar breached his duty as a fiduciary when he successfully bid for the franchise for himself. In the first trial, the district court, sitting without a jury, dismissed the complaint and entered a judgment substantially the same as that appealed from now. We vacated that judgment and remanded the case upon our determination that the district court should have granted appellant's motion for a new trial to receive the testimony of Kenneth Lutz, an associate of Dunbar. We stated that testimony consistent with Lutz' affidavit submitted with the motion, if credited, would probably require the entry of judgment for appellant.

Paragraph 5 of Lutz' affidavit asserted that appellant's principal officer, House, at the outset told Dunbar in Lutz' presence, that the original franchise under which it was operating had been cancelled and that the business was operating under an expired license. The affidavit stated that in order to sell the business for appellant to an undisclosed principal, Dunbar undertook to represent appellant as its agent to attempt to obtain a franchise. This statement was in direct contradiction of appellee's contention that House represented that he had a valid franchise but that he merely wanted some assistance in ironing out some difficulties about fees appellant was having with the city. Upon remand, Kenneth Lutz, on cross-examination, testified that from the first meeting with House it was his understanding that appellant had a valid, although disputed franchise,

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 74-1430

TELEVISION RECEPTION CORPORATION - *Plaintiff-Appellant*

v.

CHARLES A. DUNBAR,
DUNBAR-MURPHY COMPANY, INC.,
COMMONWEALTH CABLE CO. - *Defendants-Appellees*

Before: WEICK, EDWARDS, McCREE, Circuit Judges.

JUDGMENT

APPEAL from the United States District Court for the Eastern District of Kentucky.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Defendants-Appellees recover from Plaintiff-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

ENTERED BY ORDER OF THE COURT
(s) JOHN P. HEHMAN, *Clerk*

Issued as Mandate: April 10, 1975

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Nos. 18072-18843

TELEVISION RECEPTION CORPORATION,
Plaintiff-Appellant,
v.
CHARLES A. DUNBAR,
DUNBAR-MURPHY COMPANY, INC.,
COMMONWEALTH CABLE CO.,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Eastern District of Kentucky, London Division.

Before EDWARDS and MCCREE, Circuit Judges, and O'SULLIVAN,* Senior Circuit Judge.

MCCREE, Circuit Judge.

This is an appeal from a judgment entered in a diversity action in which the plaintiff initially commenced an action against Charles Dunbar, a Florida resident, and Dunbar-Murphy & Co., a Florida Corporation. In its complaint, plaintiff alleged that during the period of time relevant to the controversy it owned and operated a cable television system in Somerset, Kentucky. Plaintiff further alleged that Dunbar, individually and in his capacity as president of Dunbar-Murphy & Co., orally agreed: (1) to aid plaintiff in its efforts to obtain a twenty year franchise from the city of Somerset for the operation of plaintiff's cable

*When this case was argued, Judge O'Sullivan, as an active judge of this court, presided.

television system, and (2) to purchase the cable television system on behalf of an undisclosed principal. Finally, plaintiff alleged that despite these undertakings, Dunbar fraudulently entered a bid for the franchise on behalf of Dunbar-Murphy & Co. and the company was awarded the franchise by the City Council. Plaintiff sought an adjudication that Dunbar-Murphy & Co. held the franchise in trust for plaintiff and should be required to transfer it to plaintiff, or, in the alternative, should pay plaintiff $350,000 in damages.

After the complaint was filed, Dunbar-Murphy assigned its franchise to Commonwealth Cable Company, a newly organized Kentucky corporation. This assignment was approved by the Somerset City Council, as required by the franchise agreement. Commonwealth Cable Company then commenced an action in the Pulaski County, Kentucky Circuit Court against Television Reception Corporation seeking a declaration that Television Reception was usurping Commonwealth Cable's franchise by continuing to operate the cable television system.

Television Reception responded by filing motions in the federal district court requesting that Commonwealth Cable be made a party defendant in the federal action and that it be enjoined from prosecuting the action pending in the Pulaski County Circuit Court. The District Judge granted both motions.[1]

After being made a party defendant in the federal action, Commonwealth Cable filed a counterclaim seeking the same relief it had requested in the state court action. In particular, Commonwealth Cable sought an order requiring Television Reception to cease operating its cable television system and to remove its equipment from the City of Somerset.

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[1]These rulings by the District Judge were the subject of a separate appeal filed in this court (No. 18072). This earlier appeal has been consolidated with the appeal from the judgment entered on the merits.

The action then proceeded to trial before the District Judge sitting without a jury. The District Judge dismissed plaintiff's complaint, ordered plaintiff to cease operating its cable television system in Somerset, Kentucky and to remove its equipment from the city, and also ordered plaintiff to pay defendants the profits received from the operation of the cable television system after June 28, 1966, the date the franchise agreement between the city and Dunbar-Murphy was signed.

After judgment was entered, plaintiff filed a motion for a new trial and two supporting affidavits. One of the affidavits was executed by Kenneth Lutz, a former business associate of Dunbar, who had been present during the initial discussions between Dunbar and Clyde House, the president of Television Reception. This affidavit supported the testimony given by House during the trial. The other affidavit, which was filed by House, indicated that efforts to obtain Lutz's presence at the trial had been made, but that he could not be located until two weeks after the trial. The District Judge denied the motion for a new trial without comment.

On appeal, plaintiff has, for the first time, raised a number of objections to the jurisdiction of the District Court. Challenges to the jurisdiction of a federal court can be raised at any stage of the proceedings, and even the party who originally invoked the federal court's jurisdiction is not precluded from making such a challenge. American Fire & Casualty Co. v. Finn, 341 U.S. 6, 17-18, 71 S.Ct. 534, 95 L.Ed. 702 (1951); Central States Co-ops. v. Watson Bros. Transp. Co., 165 F.2d 392, 394 (7th Cir. 1948). We hold, however, that the challenges presented are without merit.

Plaintiff's first contention is that although Dunbar-Murphy & Co. was incorporated in Florida, its principal place of business was in Kentucky and therefore the requi-

site diversity of citizenship between plaintiff and each defendant was not present. 28 U.S.C. § 1332(a); Strawbridge v. Curtis, 7 U.S. (3 Cranch) 267, 2 L.Ed. 435 (1806). Plaintiff relies on the fact that at the time the action was instituted, Dunbar-Murphy's primary asset was the franchise for the operation of the cable television system. The only assets of the company located in Florida were an office, some office furniture and a small bank account.

Despite these facts, we find plaintiff's contention unpersuasive. In determining where a corporation has its principal place of business, a court must evaluate the facts of the particular case and decide "which facts are important and which facts are relatively unimportant." Kelly v. United States Steel Corp., 284 F.2d 850, 852 (3rd Cir. 1960). In the present case, the nature of Dunbar-Murphy's business renders the location of its primary asset at the time the action was commenced largely irrelevant to the determination of the state of its principal place of business. The company served as a corporate shell for the activities of Charles Dunbar. These activities included Dunbar's attempts to arrange purchases and sales of cable television systems throughout the country. Dunbar did not intend to operate these systems through Dunbar-Murphy & Co. Indeed, in the present case Dunbar-Murphy assigned the franchise on the Somerset system to Commonwealth Cable shortly after obtaining it. Thus, the company's ownership of the franchise was merely a temporary circumstance related to Dunbar's efforts to arrange a sale of the Somerset system. This type of ownership alone is not sufficient to make Somerset, Kentucky the principal place of business of Dunbar-Murphy & Co. for purposes of diversity jurisdiction.

Plaintiff's second objection to the District Court's jurisdiction is that even if diversity existed at the time the action was commenced, the assignment of the franchise to

Commonwealth Cable, a Kentucky corporation, and the joinder of Commonwealth Cable as a party defendant defeated it.

The general rule is that federal jurisdiction is tested according to the facts as they exist at the time an action is initiated and that diversity jurisdiction, once acquired, is not defeated by events occurring subsequent to the commencement of the action. Smith v. Sperling, 354 U. S. 91, 93, 77 S.Ct. 1112, 1 L.Ed. 2d 1205 n. 1 (1957); Wichita R. R. & Light Co. v. Pub. Util. Comm'n, 260 U.S. 48, 54, 43 S.Ct. 51, 67 L.Ed. 124 (1922). We perceive no reason to deviate from this general rule in the present case where, pursuant to Rule 25(c), Fed. R.Civ.P.,[2] the District Judge ordered the joinder of a transferee *pendente lite*. *See* 3B J. Moore, Federal Practice ¶ 25.08, at 25-326 (2d ed. 1969). *Cf.* Jones v. Village of Proctorville, 303 F.2d 311 (6th Cir. 1962); People of Porto Rico v. Fortuna Estates, 279 F. 500 (1st Cir. 1922). The joinder did not alter the respective substantive rights of the tranferor or of the transferee *pendente lite*, and, regardless of whether the transferee was made a party to the action, its rights in relation to the franchise depended on the outcome of the litigation between Television Reception and the transferor, Dunbar-Murphy & Co. 3B J. Moore, Federal Practice ¶ 25.08 (2d ed. 1969); O'Donohue v. First National Bank, 166 F.Supp. 233 (E.D. Pa. 1958). Joinder merely represented a discretionary determination by the District Judge that Commonwealth Cable's presence would facilitate his conduct of the litigation.

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[2]Rule 25(c) provides:

(c) Transfer of Interest. In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule.

Plaintiff's final jurisdictional objection is that the city of Somerset, Kentucky was a non-diverse, indispensable party to the action because complete relief could not be accorded in its absence and because the parties to the action could incur inconsistent obligations to the city if it were not made a party. Plaintiff relies on Rule 19, Fed. R.Civ.P., which provides, in pertinent part:

> a. *Persons to be Joined if Feasible.* A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.
>
> b. *Determination by Court Whenever Joinder not Feasible.* If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment

> rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Plaintiff contends that complete relief could not be accorded to it because a provision in the franchise agreement requires the city's approval of any assignment of the franchise. Since plaintiff sought the imposition of a constructive trust in its favor and an order requiring the constructive trustee to assign the franchise to it, the city would have to be made a party so that, in the event the litigation was terminated in plaintiff's favor, the court could order the city to approve the assignment.

The difficulty with this argument is that plaintiff did not charge that the City of Somerset was a part of the fraud allegedly perpetrated by Dunbar. The city's involvement in the controversy was limited to its decision to grant the franchise to Dunbar and plaintiff has not suggested that this decision was motivated by any reason other than that Dunbar's bid was the most attractive.

Under these circumstances, it is doubtful the District Court could compel the city to approve an assignment of the franchise to plaintiff even if plaintiff succeeded in establishing its allegations of fraud. The city in its discretion decided that plaintiff's bid was not the best of the three presented[3] and, in the absence of any impropriety in reaching this decision, it should not be compelled to enter into a franchise agreement with a rejected bidder. Accordingly,

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[3]In addition to the bids submitted by Television Reception Corporation and Charles Dunbar, a third bid was submitted by Comex Cable Company.

the imposition of a constructive trust would not be appropriate and the city's presence would not be necessary for the other form or relief (monetary damages) requested by plaintiff.

Plaintiff also contends that the District Court could not grant complete relief to Commonwealth Cable on its counterclaim unless the city was made a party. This contention also is without merit. The relief sought by Commonwealth Cable is expressly authorized by Kentucky law, and the relevant provisions do not require that the governmental unit which granted the franchise be made a party to the action. *See* K.R.S. §§ 415.030, 415.080. Under section 415.030 usurpation of a franchise may be prevented "by an ordinary action." Moreover, Commonwealth Cable's ownership of the franchise was uncontroverted and it therefore was the proper party to initiate the action authorized by the Kentucky statutes.

Plaintiff's other contentions with regard to the indispensability of the City of Somerset involve the second clause of Rule 19(a). Plaintiff contends that any judgment entered would result in inconsistent obligations between the city and the unsuccessful party and that this could be prevented only if the city were made a party. We conclude that, to the contrary, no inconsistent obligations would be created, regardless of the outcome of the litigation. The City of Somerset severed its legal relationship with plaintiff in April, 1966 when it terminated plaintiff's license by repealing the ordinance under which plaintiff had been given authority to operate its cable television system. A judgment in favor of the defendants would not first resurrect, and then impair, the now terminated legal relationship between the city and plaintiff. On the other hand, a judgment in favor of plaintiff would not alter the existing legal relationship created by the franchise agreement between the city and Commonwealth Cable, since we already have

concluded that a compelled transfer of the franchise would not be an appropriate form of relief.[4]

Accordingly, we hold that the City of Somerset is not a party who is "contingently necessary" under the criteria of Rule 19(a), Fed.R.Civ.P. This makes it unnecessary to consider the indispensability factors of Rule 19(b), Fed.R. Civ.P. The District Court therefore was not divested of jurisdiction for any of the reasons presented on appeal and it was proper for the District Judge to determine the merits of the controversy.

Plaintiff's primary objection related to the merits is that the District Judge's refusal to grant a new trial was erroneous. Plaintiff filed two affidavits to support the motion for a new trial. The first, filed by Clyde House, recounted House's efforts to obtain Kenneth Lutz's presence at the trial. House stated that he had personally endeavored to locate Lutz prior to the trial, but had been unsuccessful. He also stated that after deposing the defendant Dunbar and learning that Lutz at one time had resided in St. Louis, Missouri, he had employed a detective agency to locate Lutz, but the agency also had been unsuccessful. Finally, House stated that Lutz had heard about House's efforts to locate him and had called House. After talking to House, Lutz indicated his willingness to file an affidavit and to testify if a new trial should be granted.

In his affidavit Lutz stated that he had been a business associate of Dunbar during the period when Dunbar was negotiating with House about the Somerset cable television system, and that he had been present during the initial discussion between Dunbar and House. Lutz further stated that during this discussion Dunbar talked only about acting

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[4]The inappropriateness of a compelled transfer also means the city would not have to be made a party to prevent impairment of its interest in the franchise. *See* Rule 19(a) (2) (i), Fed. R. Civ. P.

as a broker to arrange a sale of House's system and not about acting for himself as a principal; that Dunbar stated to House he had a buyer ready to purchase the system, but privately admitted to Lutz that this was not true; that Dunbar was informed by House that the original franchise under which the Somerset system was being operated had been cancelled and that Television Reception was then operating under a terminated license; that being so advised, Dunbar agreed to act as House's agent to attempt to obtain a franchise for House in order to enhance the value of the Somerset system; and that Dunbar, in violation of his fiduciary obligation to House, talked instead to two city officials about obtaining the franchise in his own behalf or for Dunbar-Murphy & Co.

These statements by Lutz directly contradicted important findings of fact made by the District Judge. The District Judge had found that House had misrepresented to Dunbar that Television Reception Corporation was operating under an existing franchise and that Dunbar had learned there was no franchise during a city council meeting. Despite these important contradictions and their source, the District Judge denied the motion for a new trial without stating any reasons for his ruling.

Rule 59(a), Fed. R. Civ. P., provides, in pertinent part:

> (a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues * * * in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

Although we regret the necessity of prolonging this already protracted litigation, we conclude that the District Judge committed a clear abuse of discretion by not at least granting the motion to the extent of opening the judgment and taking additional testimony. *See* 6A J. Moore, Federal Practice ¶ 59.05[5] (2d ed. 1966).

The uncontradicted affidavits of House and Lutz clearly assert that House diligently sought Lutz's presence as a witness at the trial, but was unable to locate him. They also disclose that Lutz, a former business associate of the defendant who was present during discussions between House and Dunbar, would testify that Dunbar had agreed to represent House in his efforts to obtain a franchise, but had violated this agreement and had acted on his own behalf. In light of the source of this evidence and its unequivocal nature, we do not consider it merely cumulative or impeaching. To the contrary, it is evidence which, if credited, would probably produce a different result. *See* Thomas v. Nuss, 353 F. 2d 257, 259-260 (6th Cir. 1965); 6A J. Moore, Federal Practice ¶ 59.08[3] (2d ed. 1966). Moreover, the District Judge had no basis for crediting or discrediting Lutz's version of the facts when he denied the motion for a new trial.

Accordingly, we vacate the judgment of the District Court and remand this case for further proceedings consistent with this opinion.

APPENDIX C

PULASKI CIRCUIT COURT

Civil Action No. 4789

TELEVISION RECEPTION CORPORATION OF SOMERSET, KENTUCKY - - - - - - - - *Plaintiff*

v.

CITY OF SOMERSET, KENTUCKY, a City of the Third Class - - - - - - - - *Defendant*

COMPLAINT

Comes the plaintiff for its cause of action against the defendant and states and alleges as follows:

1) That the plaintiff is a Kentucky corporation duly organized under the laws of the Commonwealth of Kentucky, with power to contract, to sue and be sued, and to carry on business in its corporate name.

2) That the defendant, City of Somerset, Kentucky, is and was at all times referred to herein a city of the third class organized, existing and being under the laws of the statutes of the Commonwealth of Kentucky.

3) That on or about the 26th day of June, 1958, the defendant, acting by and through its Common Council, adopted an ordinance, designated Ordinance No. 185, offering for public sale an exclusive franchise for a period of twenty (20) years for the installation and operation of a community television system to serve the residents of the City of Somerset, Kentucky, and said ordinance was given its second reading by the Common Council and approved by the Mayor of the City of Somerset, Kentucky, at a

meeting held on June 26, 1958, a copy of said ordinance being annexed hereto as Exhibit "A" and made a part hereof in its entirety by reference to the same.

4) That on or about August 25, 1958, by resolution duly made, seconded and carried, the Common Council of the City of Somerset, confirmed, ratified and approved the sale of the said community television system franchise, pursuant to the aforesaid Ordinance No. 185, referred to in Paragraph 3 above, to the plaintiff, Television Reception Corporation, as the best bidder at the sale of the same, and thereupon granted the said franchise to the plaintiff herein, a copy of the said resolution being annexed hereto as Exhibit "B" and made a part hereof in its entirety by reference to the same.

5) That subsequent to the granting of the aforesaid franchise to the plaintiff, the plaintiff established a community television cable system in the City of Somerset, Kentucky, and obtained contract rights to maintain its facilities on the utility poles of certain public utilities operating in the community and entered into the business of furnishing community television cable service to the residents of Somerset, Kentucky; that in establishing said community television service, pursuant to the grant of franchise aforesaid, this plaintiff expended many thousands of dollars and set up and operated a community television cable service and continued to operate the same until this date and proposes to operate the same in the future under its franchise for the period of twenty (20) years granted under the terms of said franchise.

6) That the plaintiff entered into contracts with company or companies already maintaining a system of poles and wires which is already regulated in the interests of the public's safety, to transmit a community television cable service to the residents of Somerset.

and that it was only after the city council meeting that Dunbar discovered that the council had revoked the franchise, at which time Dunbar recognized there was a "new ball game" and then bid for himself, but only after advising appellant to protect its own interests. This testimony was corroborative of Dunbar's version of events.

We determine that the findings of fact of the district court filed February 14, 1974, after the new evidence was received, are not clearly erroneous and that its conclusion of law based thereon that no fiduciary relationship was created is correct.

Appellant also contends that the district court erred in holding that it had no valid franchise and that it had usurped appellee Commonwealth Cable Company's franchise. In support of its contention that it had a valid franchise, appellant contends that the City of Somerset unlawfully presumed to terminate its franchise without giving adequate notice and for insufficient reasons. This constitutes an effort to attack collaterally the city's revocation of the franchise. The revocation of the franchise can only be attacked directly (*Willis* v. *Calhoun*, 145 Ky. 95, 140 S. W. 199 (1911)) and this would require the joinder of the City of Somerset as a party. If this joinder had been attempted, diversity jurisdiction would have been defeated as we pointed out in our opinion in the first appeal. We also find unconvincing appellant's contention that it had a colorable claim to a franchise and therefore could not be held to have usurped Commonwealth's franchise. The mere fact that appellant disagreed with the formal action of the Common Council of the City of Somerset is insufficient to clothe appellant with the "pretense of franchise." *Cf. Crittenden County* v. *McConnell*, 365 S. W. 2d 627 (Ky. 1931).

Affirmed.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 74-1430

TELEVISION RECEPTION CORPORATION - *Plaintiff-Appellant*

v.

CHARLES A. DUNBAR,
DUNBAR-MURPHY COMPANY, INC.,
COMMONWEALTH CABLE CO. - *Defendants-Appellees*

BEFORE: WEICK, EDWARDS, and MCCREE, Circuit Judges.

A petition for rehearing with suggestion for a rehearing en banc having come on to be heard and the suggestion for rehearing en banc not having been adopted, upon consideration, it is ORDERED that the petition be, and it hereby is, DENIED.

Entered by order of the Court
(s) John P. Hehman
Clerk

7) That since the poles and wires required for such service are already regulated in the public interest denial of a privilege license to continue the same service violates the plaintiff's equal protection and due process of the law and is therefore unconstitutional.

8) That the aforesaid franchise is still in full force and effect and legally binding upon the defendant, although the defendant, City of Somerset, Kentucky, by motion or resolution has attempted to cancel and annul the same.

9) That after the City of Somerset, Kentucky, by motion or resolution unsuccessfully attempted to cancel the aforesaid franchise, said city allowed the plaintiff to operate under a privilege license which they arbitrarily and discriminatorily denied renewal thereof to the plaintiff.

10) That the City of Somerset, Kentucky, defendant herein, does not have and did not have at any time mentioned in this complaint, legal power or authority to cancel a franchise by motion or resolution and that no authority therefor exists in the statutory law or constitutional law of the Commonwealth of Kentucky.

11) That a case of controversy exists between the plaintiff and defendant involving the attempted cancellation of the franchise purchased by the plaintiff from the defendant City; that the plaintiff's legal rights are affected by the municipal ordinances, motions or resolutions hereinbefore referred to and an actual controversy exists with respect thereto; that the plaintiff seeks to secure herein a declaration of its rights under the aforesaid grant of franchise and attempted cancellation thereof by the City of Somerset, Kentucky.

WHEREFORE, plaintiff demands a declaration of rights under the grant of franchise by the City of Somerset, Kentucky, referred to in this complaint declaring the plaintiff to be the holder of a valid, subsisting franchise to operate a community television service; that all actions of the City of Somerset, Kentucky, by motion or resolution attempting

to cancel said franchise to be held to be null and void; that the action by the City of Somerset in refusing to renew the plaintiff's privilege license violates the plaintiff's equal and due process of the law and is thereby unconstitutional; for plaintiff's costs herein and for all proper relief to which the plaintiff may appear to be entitled, the premises considered.

/s/ JOHN G. PRATHER
P. O. Box 106
Somerset, Kentucky 42501

/s/ THOMAS J. ROBERTS
2121½ Cumberland Avenue
Middlesboro, Kentucky 40965

/s/ FRITZ O. KRUEGER
North Main Street
Somerset, Kentucky 42501

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
LONDON

No. 1573

TELEVISION RECEPTION CORPORATION - - *Plaintiff*

v.

CHARLES A. DUNBAR, ET AL. - - - *Defendants*

PRELIMINARY INJUNCTION

The defendant, Commonwealth Cable Company, Inc., having moved the Court for the issuance of a preliminary injunction herein enjoining and restraining the plaintiff, and its agents, servants, employees, and attorneys, and all persons in actual concert and acting for them from prosecuting and/or proceeding with any action, filing any motions, or seeking any relief in Civil Action No. 4789 styled "Television Reception Corporation versus City of Somerset and Commonwealth Cable Company, Inc. (intervenor)", now pending in the Pulaski Circuit Court in Somerset, Kentucky, and the Court having considered said motion, the arguments of counsel, and being sufficiently advised,

IT IS NOW THEREFORE ORDERED AND ADJUDGED:

1. That said motion be and the same is hereby sustained.

2. The plaintiff, Television Reception Corporation, its agents, servants, employees, and attorneys, and all persons in actual concert and acting for them, are hereby enjoined and restrained from prosecuting, or proceeding

with any action, filing any motions, or seeking any relief in Civil Action No. 4789 styled "Television Reception Corporation versus City of Somerset and Commonwealth Cable Company, Inc. (intervenor)", now pending in the Pulaski Circuit Court in Somerset, Kentucky, pending the further orders of the Court herein, subject to the conditions set out in paragraph 3 hereof.

3. The defendant, Commonwealth Cable Company, Inc., shall execute bond in the amount of $2500.00 with good and sufficient surety, conditioned to indemnify and pay such costs and damages as may be incurred or suffered by the plaintiff, Television Reception Corporation, if it develop that said plaintiff shall have been wrongfully enjoined or restrained herein; and this order of injunction shall take effect upon the execution of said bond as set out herein.

DATED this 8 day of September, 1970.

/s/ TIMOTHY S. HOGAN
Judge (By designation)

FILED: September 10, 1970

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 20,896

TELEVISION RECEPTION CORPORATION - *Plaintiff-Appellant*

v.

CHARLES A. DUNBAR,
DUNBAR-MURPHY COMPANY, INC. and
COMMONWEALTH CABLE COMPANY - *Defendants-Appellees*

ORDER

Before WEICK, EDWARDS and McCREE, Circuit Judges.

The District Court had full authority to protect its jurisdiction by the issuance of an injunction.

The judgment of the District Court is therefore AFFIRMED.

Entered by order of the Court.

/s/ JAMES A. HIGGINS, *Clerk*

Issued as Mandate: July 15, 1971

APPENDIX D

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
LONDON

No. 1573

TELEVISION RECEPTION CORPORATION - - *Plaintiff*

v.

CHARLES A. DUNBAR, ET AL. - - - *Defendants*

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come on before the Court, sitting without a jury, for the purpose of opening the Judgment heretofore entered herein and taking additional testimony on behalf of the plaintiff, in accordance with the mandate in *Television Reception Corporation* v. *Dunbar,* 426 F. 2d 174 (6th Cir. 1970), and the Court having heard and considered said testimony together with the testimony previously given herein, and having further considered the pleadings, memoranda, and arguments of counsel herein, and being sufficiently advised, the Court does now hereby make Findings of Fact and Conclusions of Law herein as follows:

FINDINGS OF FACT

(1) That during the week of May 16, 1966, the defendant, Charles A. Dunbar, entered into negotiations with Mr. and Mrs. Clyde House, the owners and officers of the plaintiff, Television Reception Corporation, concerning a contemplated brokerage contract by which Dunbar would

represent the interests of Television Reception Corporation, and its owners, in the sale of a community antenna television system owned and operated by Television Reception Corporation in the City of Somerset, Kentucky;

(2) That, while an apparent agreement was reached among the parties, said agreement was premised upon a mutual misunderstanding among the parties as to whether or not Television Reception Corporation was then operating its antenna system pursuant to a valid and existing franchise;

(3) That on May 23, 1966, at a meeting of the City Council of Somerset, Kentucky, the defendant, Dunbar, learned that it was then the contention of the city that Television Reception Corporation had no franchise to operate its antenna system and that the city was, in fact, soliciting bids for such a franchise;

(4) That, at the aforesaid meeting, and subsequent thereto, the defendant, Dunbar, announced and communicated to the owners of the Television Reception Corporation his intention to bid on the aforesaid franchise, not on behalf of Television Reception Corporation, but on behalf of the defendant, Dunbar-Murphy and Company, Inc.;

(5) That the aforesaid announcement and communications gave the plaintiff, Television Reception Corporation, sufficient notice that the defendant, Dunbar, would not be bidding on its behalf; that the plaintiff, Television Reception Corporation, was able to, and did in fact, submit a bid on its own behalf;

(6) That, on June 27, 1966, the City of Somerset accepted the bid of Dunbar-Murphy and Company, Inc. for a community television antenna system to serve the city of Somerset, Kentucky, and on June 28, said franchise was awarded and executed;

(7) That the aforesaid franchise was subsequently assigned by Dunbar-Murphy and Company, Inc., with the full

knowledge and approval of the City of Somerset, Kentucky, to the defendant, Commonwealth Cable Company;

(8) That since June 28, 1966, the plaintiff, Television Reception Corporation, has continued to operate a community television antenna system within the City of Somerset, Kentucky, without the benefit of any franchise or license agreement;

(9) That the plaintiff, Television Reception Corporation, and its officers and directors, have known or should have known that the Corporation's operations in the City of Somerset, Kentucky, subsequent to June 28, 1966, have been without the benefit of a franchise, or any colorable claim thereto, and the stated beliefs of the officers and directors of the Corporation to the contrary are unfounded;

(10) That the plaintiff, Television Reception Corporation, has continued its operations within the city of Somerset, Kentucky, subsequent to June 28, 1966, at a profit; and

(11) That the testimony of Kenneth Lutz given before this Court following the remand of this cause by the United States Court of Appeals for the Sixth Circuit is not in substantial conflict with and does not substantially contradict any of the foregoing Findings of Fact.

CONCLUSIONS OF LAW

(1) That the negotiations among the defendant, Dunbar, and the plaintiff, Television Reception Corporation, and its owners, during the week of May 16, 1966, were conducted under such a mutual misunderstanding of a material fact that there was no "meeting of the minds" of the parties thereto, and said negotiations did not, therefore, result in any contractual obligations nor did they, in any manner, impose upon the defendant, Charles A. Dunbar, a fiduciary obligation not to compete against Television Reception Corporation in bidding for any then non-existent community television antenna system franchise;

(2) That the intention of the defendant, Charles A. Dunbar, to bid on his own behalf and not on behalf of the plaintiff, Television Reception Corporation, on such a franchise to be awarded by the City of Somerset, Kentucky, was communicated to the plaintiff, Television Reception Corporation, and its owners, officers and directors, at such a time that the Corporation was able to submit such a bid in its own behalf and the plaintiff Corporation, therefore, suffered no damages by reason of the failure of the defendant, Charles A. Dunbar, to submit a bid in its behalf;

(3) That, by operating a community television antenna system in the city of Somerset, Kentucky, subsequent to June 28, 1966, the plaintiff, Television Reception Corporation, has usurped the franchise of the defendant, Dunbar-Murphy and Company, Inc., and its assignee, the defendant, Commonwealth Cable Company;

(4) That the defendant, Commonwealth Cable Company, is entitled to mandatory injunctive relief requiring the plaintiff, Television Reception Corporation, to remove its equipment from and to cease operations within the City of Somerset, Kentucky;

(5) That the defendant, Dunbar-Murphy and Company, Inc., and the defendant, Commonwealth Cable Company, are entitled to recover from the plaintiff, Television Reception Corporation, those profits accruing to Television Reception Corporation subsequent to June 28, 1966, in usurpation of the defendants' franchise and are entitled to a judgment requiring the plaintiff, Television Reception Corporation, to account for and to pay over to said defendants such profits;

(6) That these Conclusions of Law apply only to the rights of the respective parties to operate a community television antenna system within the corporate limits of the City of Somerset, Kentucky, as such limits existed on February 6, 1968, the date of the original Judgment herein, and

the Court does not hereby purport to rule on any rights or obligations accruing to the parties hereto by virtue of any changes of the corporate limits of the City of Somerset, Kentucky, subsequent to February 6, 1968.

This the 19th day of February, 1974.

(s) Bernard T. Moynahan, Jr.
Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
LONDON

No. 1573

TELEVISION RECEPTION CORPORATION - - *Plaintiff*

v.

CHARLES A. DUNBAR, ET AL. - - - *Defendants*

JUDGMENT

In accordance with the Fidings of Fact and Conclusions of Law this day filed herein, IT IS NOW HEREBY ORDERED AND ADJUDGED HEREIN AS FOLLOWS:

(1) That the plaintiff's complaint and amended complaint herein be and the same are hereby dismissed;

(2) That the plaintiff, Television Reception Corporation, and all parties acting directly or in concert therewith, shall forthwith cease all operations of a community television antenna system within the corporate limits of the City of Somerset, Kentucky, as said limits existed on February 6, 1968, and that said parties remove forthwith all of their cable, equipment, and community television antenna facilities from the streets, public ways and public places within the corporate limits of the City of Somerset, Kentucky, as said limits existed on February 6, 1968;

(3) That the plaintiff, Television Reception Corporation, produce all of its books and records relating to its profits accruing as a result of the operation of any community television antenna system within the corporate limits of the City of Somerset, Kentucky, as said limits existed on February 6, 1968, from June 28, 1966, to the date of this

Judgment; that the defendant, Dunbar-Murphy and Company, Inc., recover from the plaintiff, Television Reception Corporation, all such profits accruing to Television Reception Corporation from June 28, 1966, to January 26, 1967, the date of the assignment of the franchise; and that the defendant, Commonwealth Cable Company, recover from the plaintiff, Television Reception Corporation, all profits accruing from such operations from January 27, 1967, to the date of this Judgment;

(4) That the amount of the monetary recoveries provided for herein shall be subject to further Orders of this Court;

(5) That this Judgment, disposing of all claims pending in this action, leaving only an accounting for the profits accrued to Television Reception Corporation in usurpation of the franchise of the defendants, Dunbar-Murphy and Company, Inc. and Commonwealth Cable Company, is declared to be final and appealable;

(6) That the defendants, and each of them, shall recover from the plaintiff their respective costs properly taxable herein.

This the 19th day of February, 1974.

(s) Bernard T. Moynahan, Jr.
Judge

APPENDIX E

Fifth Amendment to the Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section One of the Fourteenth Amendment to the Constitution of the United States:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1433

TELEVISION RECEPTION CORPORATION, - Petitioner,

versus

COMMONWEALTH CABLE COMPANY, - Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

T. KENNEDY HELM, JR.
BEN B. FOWLER
STITES, McELWAIN & FOWLER

3400 First National Tower
Louisville, Kentucky 40202

500 McClure Building
Frankfort, Kentucky 40601

Counsel for Respondent

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1433

TELELVISION RECEPTION CORPORATION - *Petitioner,*

v.

COMMONWEALTH CABLE COMPANY, - *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

May it please the Court:

The Petition for Writ of Certiorari does not state grounds which would justify the issuance of the Writ under the criteria contained in Supreme Court Rule 19. Our statement of the case shows that there is no fundamental right of the Petitioner which has been violated or abridged.

STATEMENT OF THE CASE

A brief history of this action is appropriate in response to the Petition for Writ of Certiorari.

This action was commenced by Petitioner, a Kentucky corporation, in the United States District Court

for the Eastern District of Kentucky against Charles A. Dunbar and Dunbar-Murphy Co., both Florida residents. The sole ground of Federal jurisdiction being diversity of citizenship. The claim was based on the breach of a fiduciary obligation in the bidding for a cable TV franchise in the City of Somerset, Kentucky. The relief sought was to recover the franchise from the successful bidder, Dunbar-Murphy, or in the alternative for damages. Pending this action Dunbar-Murphy assigned the franchise to a newly formed Kentucky corporation, Commonwealth Cable Co., the Respondent herein. Commonwealth Cable Co. commenced an action in State Court to enforce its franchise against the Petitioner on the ground that Petitioner was usurping its franchise right. See KRS 415.030, 415.080. Petitioner obtained an injunction from the District Court preventing Respondent from proceeding in State Court, and also an order making the Respondent, Commonwealth Cable Co., a party defendant. Both of those orders were objected to by Respondent in the District Court.

Commonwealth Cable Co., now a defendant in this action, filed a counterclaim against Petitioner, plaintiff in this action, on the same grounds it had asserted in State Court. The Petitioner's reply to the counterclaim was a general denial of usurpation. The action was tried and the District Court rendered a judgment dismissing the Petitioner's claim and granting the Respondent full relief on its counterclaim.

On appeal the action was remanded for new trial for reasons not appropriate to this Petition. The opin-

ion of the Sixth Circuit, A.B-1, dealt at length with the jurisdictional problem presented. The Court held that the City of Somerset was not an indispensible party to the Petitioner's claim for damages, and that under the Kentucky Statutes the City was not a necessary party to a franchise holder's action against a person usurping its franchise right.

Pending the appeal, Petitioner commenced an action against the City of Somerset in State Court to require the City to recognize an old TV cable franchise issued to it in 1958 (the franchise held by Respondent was issued in 1966). A.C-1. On remand, the Respondent obtained an injunction against Petitioner prohibiting its proceeding in State Court. A.C-5. This injunction was issued under the District Court's authority to protect its jurisdiction. 28 USCA Sec. 2283. For this reason the Circuit Court of Appeals affirmed the injunction order. A.C-7. It is this Preliminary Injunction, issued solely to protect federal jurisdiction, that constitutes the Petitioner's main claim of a denial of due process.

Later the District Court granted Petitioner leave to file an amended complaint, setting up its 1958 franchise and asserting that the Respondent was usurping its franchise right because the old franchise was by its terms exclusive. The Petitioner did not attempt to amend its Reply to the Respondent's Counter-claim asserting that the existence of its old franchise constituted an affirmative defense to Respondent's claim. Respondent argued, unsuccessfully, that this amendment was improper after remand because there had

been no change in either law or fact from the time of the commencement of the action to the time of the amendment.

The issues raised by the amended complaint were fully tried on their merits in District Court. The District Court found that the old franchise was not in existence and that the Petitioner had knowledge of the fact. A.D-3(9). The Circuit Court of Appeals in its opinion affirming the Judgment stated, in effect, that the record showed a revocation of the old franchise by the City and that this action of the City was not subject to collateral attack. A.A-3. Although not articulated in the opinion, it was clear that the Petitioner was asserting its old franchise as grounds for a claim for relief and not as an affirmative defense to the Respondent's counterclaim; in this context the Court of Appeals was certainly correct.

CONCLUSION

The Petitioner claims a denial of due process. It initially chose the federal forum. Its alleged dilemma is solely of its own making which resulted in the peculiar conflicts which of necessity exist in our system of federal jurisprudence. Furthermore, its main complaint is the issuance, during the pendency of this action, of a Preliminary Injunction which was granted solely to protect the federal jurisdiction which was invoked initially by the Petitioner.

The Petition for Writ of Certiorari should be denied.

T. KENNEDY HELM, JR.
BEN B. FOWLER
STITES, MCELWAIN & FOWLER

3400 First National Tower
Louisville, Kentucky 40202

500 McClure Building
Frankfort, Kentucky 40601

Counsel for Respondent